SUPREME COURT, U. S.

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No. 281

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN J. TYNE, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 409 F. 2d 485. A prior opinion of the court of appeals (Pet. App. B) is reported at 385 F. 2d 40.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1969. (Pet. A1.) The petition for a writ of certiorari was filed on June 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

358-107—69

QUESTION PRESENTED

Whether, and to what extent, petitioner is entitled to a deduction for transportation expenses incurred while driving his car, with approximately 200 pounds of tools in it, between his residence and work sites.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) *In General.*—There shall be allowed as a deducton all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and
>
> * * * * *
>
> SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

In 1967 the Tax Court, sustaining the Commissioner's determination, held that petitioner was not entitled to any deduction on his 1957, 1958 and 1960 returns for transportation expenses (assertedly $1,328.04, $1,881.66 and $940.43, respectively) incurred

in driving his automobile and truck between his residence and various work sites. Petitioner had claimed that the deductions were justified because he had transported essential work tools weighing approximately 200 pounds. (Pet. B1–B2.) In holding that the expenses involved were non-deductible commuting expenses, the Tax Court relied upon its prior decision in *Sullivan* v. *Commissioner*, 45 T.C. 217. Subsequently, the *Sullivan* decision was reversed by the Second Circuit, which adopted an allocation rule as appropriate in the circumstances and remanded the case to the Tax Court to determine the amount of the expenses allocable to the transportation of tools. *Sullivan* v. *Commissioner*, 368 F. 2d 1007.*

On petitioner's first appeal in this case, the Seventh Circuit reversed the Tax Court's decision and, adopting the allocation rule announced by the Second Circuit in *Sullivan*, remanded the case with instructions that the Commissioner "determine the allocation of the proportion of driving expenses which is a reasonable cost of doing business under Section 162" (385 F. 2d 40, 42). On remand, the Commissioner made a fifty percent allocation of expenses attributable to tool transportation, and the Tax Court entered its decision accordingly. (Pet. Apps. D and E.) On petitioner's appeal from that decision, the Seventh Circuit

*On remand in *Sullivan*, the Tax Court allocated one-third of the expenses to the transportation of the tools and found that the taxpayer would have driven to work even if it had not been necessary to transport the tools. On further appeal, the Second Circuit affirmed without opinion, and the taxpayer subsequently filed a petition for a writ of certiorari. *Sullivan* v. *Commissioner*, No. 195, October Term, 1969.

again reversed and remanded to the Tax Court for a determination whether petitioner met the test of Rev. Rul. 63-100, 1963-1 Cum. Bull. 34, that he would not have incurred the expenses "but for" the necessity of transporting the tools, so as to entitle him to a 100 percent deduction. (Pet. A1-A4.)

ARGUMENT

The decision below remanding the case to the Tax Court for determination on an alternate theory of deductibility does not deny petitioner any deduction to which he is entitled. There is no conflict of decision or other ground for further review.

1. If petitioner would have driven to work regardless of the need for transporting tools, his driving expenses were personal commuting expenses, and there would be no basis for any deduction. See *United States* v. *Correll*, 389 U.S. 299, 303. On the other hand, if the Tax Court on remand should find that petitioner would not have driven to work but for the necessity of carrying his tools (Rev. Rul. 63-100, 1963-1 Cum. Bull. 34), he may be entitled to a greater deduction for the transportation expenses. Absent such a finding, however, there is nothing to justify a larger deduction than the 50 percent allocation made by the Commissioner and adopted by the Tax Court. The decision may well be generous, for it is not clear that moving tools from home to job is any less a commuting expense than is the cost of moving the taxpayer himself.

2. The decision here is consistent with the other appellate decisions on the point. If the Tax Court

should determine on remand that petitioner would have driven to work in any event, and consequently rest its decision on an allocation determination, the disposition in this case is indistinguishable from *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (C.A. 2). If the Tax Court finds that petitioner's expenses are within the "but for" test of Rev. Rul. 63–100, *supra*, the disposition here will be based on a theory which was factually resolved against the taxpayer in *Sullivan*.

Nor is there any conflict with *Crowther* v. *Commissioner*, 269 F. 2d 292 (C.A. 9). As the Ninth Circuit subsequently made clear in *Mathews* v. *Commissioner*, 310 F. 2d 98, the decision in *Crowther* turned on whether taxpayer was entitled to deduct "traveling expenses * * * while away from home," within the meaning of Section 162(a)(2) of the Internal Revenue Code of 1954. It is not contended here that petitioner incurred the transportation expenses "while away from home."

3. Petitioner also challenges the court of appeals' denial of his motion seeking relief from certain collections made by the Internal Revenue Service subsequent to the Tax Court's decision on remand. The Commissioner conceded in the court of appeals that part of the collections were unwarranted, and a refund has already been made. As the court of appeals observed, "Further abatement and refund will depend upon further decision by the tax court" on the second remand (Pet. App. C2). The propriety of the collection action thus provides no occasion for further review by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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